CC:OS/GC

ORIGINAL

Public
Chairman
comm(4)
DP
BCL
BOE
BTA
OP

BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 04-12
NON-VESSEL-OPERATING COMMON CARRIER SERVICE ARRANGEMENTS

COMMENTS OF THE NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC.

In accordance with the Commission's Notice of Proposed Rulemaking ("NPRM") published November 3, 2004 (69 *Fed. Reg.* 63981), the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA") submits these comments addressing the proposal that would authorize non-vessel-operating common carriers ("NVOCC's") to enter into service arrangements with their customers.

In several submissions in the various dockets that led to the Commission's promulgation of this NPRM[1], the NCBFAA explained its support for the Commission's use of its exemption authority under Section 16 of the Shipping Act, 46 U.S.C. (App. § 1715), to authorize NVOCC's to enter into service contract arrangements with their shipper customers. (As the NPRM refers to these contracts as NVOCC Service Arrangements, or "NSA's," we shall use that term in these comments.) The NCBFAA believes that this is a welcome step in the process of eliminating archaic, unnecessarily costly and burdensome provisions that have imposed artificial constraints on the ability of NVOCC's to provide efficient service to the shipping public. By recognizing the transformation of the ocean shipping market place into one of contract, rather than

---

[1] PMC Docket Nos. P3-03, P5-03, P7-03, P8-03, P9-03, P6-04, P2-04 and P4-04.

common, carriage the Commission has wisely utilized its authority in a way that can benefit the entire industry.

Nonetheless, the NCBFAA believes that certain of the restrictions that would be imposed on the NSA's are unnecessary, serve no useful public purpose or policy and will unnecessarily hamstring NVOCC's operations. The burdens and costs resulting from the requirement that NSA's be filed with the agency and that their essential terms be published in tariff form have no countervailing benefit. Notwithstanding the NPRM's, attempt to use (incorrectly, we believe) the "detrimental to commerce" test in section 16 as support, there is no evidence or policy basis underlying the conclusion that NVOCC's, shippers or any other persons would benefit by requiring the filing and publication of NSA's. Consequently, the NCBFAA urges that the Commission reconsider its approach on this issue, for the reasons discussed below.

I. The Commission's Exemption Authority

Congress has delegated to the Commission broad authority to grant the exemption from *any* of the requirements of the Shipping Act as long as the exemption (1) will not result in a substantial reduction in competition or (2) be detrimental to commerce. Section 16 of the Shipping Act now provides:

> The Commission, upon application or on its own motion, made by order or rule exempt for the future *any* class of agreements between persons subject to this Act or *any* specified activity of those persons from *any* requirement of this Act if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce.

46 U.S.C. App. § 1715 (2003). (Emphasis added.)

Several parties originally contended that this authority did not permit the Commission to use its exemption authority exempt NVOCC's from the tariff publication

provisions of Section 8 or to permit NVOCC's to enter into NSA's or any contractual arrangements with their customers. Those objections have been withdrawn, at least with respect to the NSA issue. Regardless, the FMC's exemption authority is extremely broad. Read literally, the word "any" means exactly that; the Commission does have the authority to exempt any party from any requirement of the Act as long as the exemption does not result in a substantial reduction competition or any detriment to commerce.

The NCBFAA agrees with the Commission's conclusion that the Supreme Court's holding in *Maislin Industries, U.S. Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) ("*Maislin*") does not preclude the Commission from issuing the exemption proposed in this NPRM. While the Commission is correct that *Maislin* is distinguishable because it related to a different statute and a different regulatory regime, another distinction is relevant to the situation here. In deciding to administratively deregulate motor common carrier tariffs if shippers and carriers had elected to negotiate a different rate level, the Interstate Commerce Commission ("ICC") did so through a policy statement. *Maislin*, 497 U.S. at 121-22. Unlike the situation with rail or motor contract carrier traffic, the ICC then had no broad exemption powers that could modify the tariff filing and adherence obligation of motor common concerns.[2] However, if the Commission agrees that any particular statutory requirement no longer serves a valid public policy, and if the exemption otherwise satisfies the criteria of Section 16, the Commission can and should, use its expertise of authority to issue the sort exemption.

---

[2] The ICC's broad exemption authority pertained only to rail carriers, although the agency did have the ability to grant relief in the rate area to motor contract carriers. *See* former 49 U.S.C. §§ 10505 & 10762 (1984 Ed.). *Motor Freight Tariff Ass'n v. U.S.*, 757 F.2d 301 (D.C. Cir. 1985). With the later enactment of the Interstate Commerce Commission Termination Act of 1996 ("ICCTA"), Congress fixed that shortcoming, so that the Surface Transportation Board, the successor to the ICC, can now exempt rail carriers and/or motor carriers from any regulatory provision of the ICCTA, per 49 U.S.C. §§ 10502(a) and § 13541, respectively.

II. The Proposed Exemption Will Enhance, Not Reduce, Competition

The NPRM appears to misperceive the position of several commenters including, presumably, the NCBFAA. In this regard, the NPRM states:

> Contrary to the assertions of some commenters and proponents, the statutory criteria for exemption do not include whether the requirements from which relief is sought are "infrequently used by shippers" or that the requirements "serves no valid public policy."

But the NCBFAA never contended that these principles satisfied the criteria of Section 16. The virtually unrebutted record evidence in these proceedings clearly demonstrates that rate tariffs are in fact "infrequently used by shippers." Similarly, there has been no serious contention made that the continued publication of tariffs or the proposed filing of NSA's and publication of essential terms serves any "valid public policy." By providing evidence of these facts, the NCFBAA was explaining why it was essential for the Commission to take action in this area, but was not contending that those facts satisfied the exemption criteria of Section 16.

The Commission correctly concluded that permitting NVOCC's to enter into NSA's will not result in a substantial reduction of competition. To the contrary, and as noted by former Chairman Koch over ten years ago, an exemption that eliminates adherence to common carrier tariffs "would produce just the opposite--it would produce more effective competition because the market would not be impeded or restrained by the artificial restriction of a filed tariff." Statement of Chairman Koch on NVOCC Tariff Filing, 26 S.R.R. 465, 468 (August 1992).

In reviewing the competition issue, the Commission briefly addressed competitive relationships among NVOCCs and between NVOCC's and VOCCs. With respect to the issue of competition between NVOCCs, the Commission appears to have focused on the

unusual decision in *United States v. Tucor*, 189 Fed. 3d 834 (9th Cir. 1999) and concluded, based on that, that permitting two or more NVOCC's to enter into NSAs might inadvertently cloak the arrangement with antitrust community. The Association believes that *Tucor*, for whatever authority it might hold, is inapplicable to the situation posed here since it focused only on Section 7(a)(4) of the Act, which is not relevant to the NSA's under consideration in this proceeding.

There is accordingly no reason to believe that any court would find that NVOCC's would somehow be imbued with antitrust immunity simply because they somehow participated in NSA's. Moreover, given the large number of NVOCCs and the nature of the marketplace, it is inconceivable that several of them acting together could somehow engage in market distorting behavior or substantially reduce competition in the industry. Nonetheless, in the event that extremely remote possibility did occur, the Commission would be able to quickly terminate or modify the exemption and end any conceivable question as to whether these companies could somehow be freed from concerns under the antitrust statutes. Consequently, the NCBFAA believes that the Commission was unduly restrictive by precluding NVOCC's from either being able to jointly enter into NSAs with customers or enter into an NSA in its capacity as a shipper.

More importantly, the NCBFAA disagrees with the NPRM's conclusion that the NSA filing and essential terms publication requirement is somehow required to ensure that "there is no substantial reduction in competition between NVOCCs and VOCCs." Other than a single conclusary statement, the NPRM provides no explanation of how the filing/publication requirement has anything to do with competitive relationships between NVOCC's and steamship lines. While imposing this restriction on NVOCC's does

mirror the obligations of VOCC's with respect to service contracts, that is not a justification to impose those burdens on NVOCC's.

It is absolutely clear that NVOCC's and VOCC's function differently and are treated differently under the Act. For example, VOCC's enjoy antitrust immunity and have favored status under the Foreign Shipping Practices Act. Consequently, the imposition of these restrictions on NVOCCs for the sole purpose of providing comparability and/or the "level playing field" fiction only serves to minimize the benefits that would otherwise result from giving authority to NVOCCs.

As the NCBFAA has previously pointed out, the filing of service contracts and publication of essential terms requirements were designed by Congress to facilitate the Commission's oversight of VOCC's in order to prevent abuse of the antitrust immunity they enjoy.[3] . Since NVOCC's do not have antitrust immunity, the statutory purpose and policy behind service contract filing is inapposite to NVOCC v SA's. Similarly, the only other reason Congress required the publication of service contract essential terms was that maritime labor organizations would find such information useful for determining cargo flows; hence, the suggestion that this is somehow useful for shippers--who in any event rarely access any NVOCC tariff--is exactly wrong.[4]

III. The Proposed Restrictions On NSAs Are Detrimental To Commerce

The NPRM indicates that the proposed restrictions of NSA filing and essential terms publication are required to ensure that the exemption is not detrimental to

---

[3] *See, e.g.*, Reply of the NCBFAA to Joint Supplemental Comments requesting exidicted adoption of a conditional exemption from tariff publication, filed in the various exemption dockets noted above at n.1, filed September 8, 2004, at 3-4.

[4] *Id.*, at 4, n.4.

commerce, in that the shipper protections embodied in the Act would otherwise be illusory.

> Many important shipper protections provided for in the Shipping Act relating to service contracts offered by VOCCs ensure against detriment to commerce. Thus, the Commission proposes making applicable to carriage under an NSA, those provisions of the Shipping Act that would applicable to service contracts.

69 Fed. Reg. at 63987. The NCBFAA believes these concerns are misplaced.

If the NCBFAA's proposal that these restrictions be dropped was adopted, shippers would clearly benefit since the substantial cost savings realized by NVOCC's would be passed on to the consumers in the form of lower prices. Similarly, NVOCCs would have enhanced flexibility to respond quickly to market signals and would not be required to postpone services pending the formality of the filing/publication requirements. And, NVOCCs would be better able to tailor their service and price options to the individual in varying needs of their customers if they were not required to fit within an arbitrary contract/essential terms framework that is necessary solely for the administrative convenience of reducing all contracts to the single, lowest common denominator.

The Commission's focus on this issue appears primarily to be indicative of a concern that its ability to effectively regulate would be impaired if the filing/publication restrictions on NSA's were not imposed. Yet, Congress established that this concern was no longer relevant to the exemption process when the Ocean Shipping Reform Act ("OSRA") was enacted. By removing the requirement that an exemption "not substantially impair effective regulation by the Commission," Congress unequivocably intended to facilitate the grant of exemptions under Section 16 by removing the

Commission's concerns about oversight--as long as the market place was sufficiently competitive and the proposed exemption was not detrimental to commerce. By focusing upon the regulatory protections embodied in Section 10 of the Act, the NPRM writes the "effective regulation" criterion back into the statute as if it had not been deleted by Congressional action in OSRA. Consequently, even if the NPRM was correct that unrestricted NSA's might deprive the Commission of its authority to address issues arising under the cited provisions of Section 10, that is what Congress intended and would not provide a basis for requiring that those restrictions be imposed.

Moving on to the expressed concern about the "filed rate doctrine," it is also important to keep the changes in the industry and the Shipping Act in mind. Congress clearly intended to remove obstacles in the path of necessary deregulatory action by the Commission when it substantially broadened the exemption powers in Section 16 by removing the "impairment of effective regulation" and "unjustly discriminatory" tests from that provision.

Although the NPRM cites the agency's concerns about possible non-compliance with Section 10(b)(1) unless the filing/publication restrictions on NSA's are imposed, it fails to recognize that Congress amended Section 10(b)(2)(A) specifically for the purpose of eliminating those concerns. Section 10(b)(2)(A) literally states that it would not be necessary for NVOCC's to adhere to filed rates if operating pursuant to an exemption.[5] In other words, Congress obviously believed the filed rate doctrine was no longer

[5] The section provides:

> No common carrier...may provide service in the liner trade that is not in accordance with the rates, charges, classifications, rules and practices container in a tariff published or a service contract ...*unless excepted under section...16 of this Act.* (emphasis supplied.)

sacrosanct and that the Commission had unfettered authority to exempt regulated parties from its costly restraints.

In considering this issue, it is worthwhile to revisit the *Maislin* case briefly to see how the Court felt about this doctrine. The majority decision of the Court rejected the ICC's attempt at administrative deregulation but only because Congress had not authorized such action by that agency in the context of motor common carriers. *Maislin,* 497 U.S. at 131. Nonetheless, the court recognized that the filed rate doctrine for motor common carriers was of dubious value in view of the changes in the industry. For example, Justice Scalia, in a concurring opinion, felt constrained to express his dissatisfaction with forcing continued adherence to the filed rate doctrine by citing Judge Posner's decision (in *Orscheln Bros. Truck Lines, Inc. v. Zenith Electric Corp*, 899 F. 2d 642, 644-45 (7th Cir. 1990):

> It may well be, as Justice Stevens' thinks, that after the 1980 amendments and the various administrative changes that the Commission has made by rule, "the [t]he skeleton of regulations remains; the flesh has been stripped away."...But it is the skeleton we are construing, and we must read it for what it says.

Here, Section 16 provides the authority necessary to eliminate the unnecessary burden and formality of the filed rate doctrine.

Similarly, Justice Stevens' dissenting opinion in *Maislin* observed, first, that "the filed rate doctrine was developed in the 19th century as part of a program to regulate the ruthless exercise of monopoly power by the Nation's railroads." (*Id.* at 138.) After examining the legislative history of the Interstate Commerce Act, Justice Stevens concluded thusly:

> And since it is no longer the policy of congress or the ICC to foster monopoly pricing in the motor carrier industry, no public object is served

> by forcing carriers to adhere to published price schedules regardless of circumstances.....Judge Posner's conclusion that strict mechanical adherence to the filed rate doctrine produces absurd results and serves no social purpose [citation omitted] is one I share.

(*Id.*, at 151.)

NVOCC's obviously have no such monopoly power. It is time for the Commission to exercise its authority, expertise and judgment and lay this skeleton in the ground.

In any event, the mere non-filing of the NSA would not mean that there was no "applicable" or "legal rate." Once the parties have reached an agreement, the agreed upon rate would necessarily be the "applicable, legal" rate whether or not it was filed; and, that rate would be enforceable between the NVOCC and the shipper. Consequently, any deviation from that legal rate would still violate Section 10(a)(1).

Moreover, the mere non-filing of the rate and/or non-publication of the essential terms publication does not mean that NVOCC's would be free to engage in false billing, false classification, or any of the other malpractices that are outlined in Section 10(a)(1). While the Commission may wish to require that each NVOCC maintain an evidentiary record of the final negotiated rate coupled with an appropriate signature by the participating shipper, anything more than that is unnecessary, costly and would minimize the benefits of the NSA procedure.

The other provisions of Section 10 cited in the NPRM do not appear to have great significance to the NSA issue. For example, Sections 10(b)(11) & (12) contain technical requirements relating to the bonding and licensing status of NVOCCs'. The NPRM suggests that these provisions are inapplicable in view of the Commission's conclusion not to permit NVOCCs to participate in NSAs; if the Commission reconsiders this restriction, these statutory standards should become applicable to NSA's. And, while the

NCBFAA does not believe there is any possibility that NVOCCs can engage in meaningful, undue discriminatory practices against ports, the filing/ publication restrictions set forth in the NPRM or NSAs have no relevance to the provisions of Sections 10(b)(5) & (9).

Finally, given the literally millions of transactions that occurred between NVOCCs and shippers annually and the minimal number of disputes between NVOCCs and their customers that ever reach the agency, the NCBFAA is aware of no policy justification for depriving NVOCCs of true across-the-board relief from strict adherence to tariff publication or NSA filing/publication requirements simply because there is a remote possibility that some NVOCC may engage in some illicit behavior. In the event the Commission does find that there is a problem that needs to be addressed by the agency, it could do so on the basis of the shipment records available from the NVOCC or its customer. Or, the Commission can then condition the exemption in that instance to include some filing requirement or, indeed, rescind the exemption in whole or in part.

The NSA process holds out a great deal of potential for freeing the NVOCC industry of unnecessary, costly and inefficient regulatory restrictions. But, the restrictions proposed by the NPRM substantially curtail the benefits otherwise available. The NCBFAA urges that the Commission reconsider the filing and publication issue and permit the industry as a whole to realize those advantages for more than just the relatively few number of shippers for when the added expense is economically justifiable.

In conclusion, the NCBFAA urges the Commission to issue a final rule approving the use of NSA's by NVOCC's, but eliminate the restrictions that would: (1) require NVOCCs to file copies of the NSA's with the Commission and publish their essential

terms in tariff form, (2) preclude NVOCCs from acting together to offer NSA's in their capacity as carriers, and (3) preclude NVOCCs from entering into NSA's in their capacity as shippers. In addition, while not technically germane to the issues raised in the instant proceeding, the NCBFAA urges the Commission promptly to issue a decision in Docket No. P5-03, involving the NCBFAA's petition for exemption of NVOCCs from tariff publication, and to grant that request.

Respectfully submitted,

Edward D. Greenberg

November 19, 2004

terms in tariff form, (2) preclude NVOCCs from acting together to offer NSA's in their capacity as carriers, and (3) preclude NVOCCs from entering into NSA's in their capacity as shippers. In addition, while not technically germane to the issues raised in the instant proceeding, the NCBFAA urges the Commission promptly to issue a decision in Docket No. P5-03, involving the NCBFAA's petition for exemption of NVOCCs from tariff publication, and to grant that request.

Respectfully submitted,

Edward D. Greenberg
Galland, Kharasch, Greenberg, Fellman
& Swirsky, P.C.
1054 Thirty-First Street, N.W.
Suite 200
Washington, D.C. 20007
(202) 342-5277

Attorneys for
National Customs Brokers and Forwarders
Association of America, Inc.

November 19, 2004